89-1096

Supreme Court, U.S.
FILED
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JOSEPH F. SPANIOL, JR.
CLERK

NO.

In The

Supreme Court Of The United States

OCTOBER TERM, 1989

IN THE MATTER OF: H. ROGER LAWLER, ETC., *Debtor.*

H. ROGER LAWLER,
Petitioner,
vs

THEODORE A. PAULISSEN, et ux.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

APPENDIX

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January 1990

U.S. COURT OF APPEALS
FILED
AUG 21 1989
GILBERT F. GANUCHEAU
Clerk

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 88-1738

D.C. Docket No. CA-3-87-2343-G

IN THE MATTER OF: H. ROGER LAWLER, ETC., *Debtor,*

H. ROGER LAWLER,
Appellant,

versus

THEODORE A. PAULISSEN,
Appellee.

Appeal from the United States District Court for the Northern District of Texas

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Before REAVLEY, POLITZ, and SMITH, Circuit Judges.

JUDGMENT

This cause came on to be heard on the record on appeal and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the judgment of the District Court in this cause is affirmed.

IT IS FURTHER ORDERED that appellant pay to appellee the costs on appeal, to be taxed by the Clerk of this Court.

August 21, 1989

ISSUED AS MANDATE:

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

NO. 88-1738

IN THE MATTER OF: H. ROGER LAWLER, ETC., *Debtor,*

H. ROGER LAWLER,

Appellant,

versus

THEODORE A. PAULISSEN,

Appellee.

Appeal from the United States District Court for the Northern District of Texas (CA-3-87-2343-G)

(August 21, 1989)

Before REAVLEY, POLITZ, and SMITH, Circuit Judges.

POLITZ, Circuit Judge:*

H. Roger Lawler filed suit against Theodore and Mary Paulissen, alleging that the Paulissens violated an automatic stay in bankruptcy. The district court concluded that Lawler's complaint was time barred by a four-year limitation provision under Texas law and, accordingly, granted summary judgment in favor of the Paulissens. For the reasons assigned, we affirm.

* Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the court has determined that this opinion should not be published.

Background

In 1974 Lawler purchased 15 acres of property in Collin County, Texas from the Paulissens, giving a promissory note and executing a deed of trust which was duly recorded. On January 9, 1976 an involuntary petition in bankruptcy was filed against Lawler. This filing was prior to the present Bankruptcy Code and the issues presented are resolved pursuant to the Bankruptcy Act of 1898, as amended. With the filing of the petition an automatic stay became effective with respect to all of Lawler's property, pursuant to Rules 401 and 601 of the prior Rules of Bankruptcy Procedure. Lawler subsequently defaulted on his note to the Paulissens and on May 3, 1977 the trustee foreclosed and the Paulissens reacquired title in satisfaction of the debt. On January 20, 1978 Lawler consented to an adjudication in bankruptcy and the case continued as a Chapter XI proceeding.

On May 22, 1981 Lawler filed an application with the bankruptcy court to permit him to retain counsel to proceed against persons alleged to have held foreclosure sales in violation of the bankruptcy stay. The application stated that the trustee in bankruptcy had informed Lawler that he did not intend to prosecute these causes of action but that he had no objection to Lawler pursuing them. Although hearings were held in June and July of 1981 it does not appear from the record that the court ever ruled on the application. Nevertheless, Lawler's plan of arrangement under Chapter XI gave him the sole right to assert and prosecute any and all claims and causes of action against third parties, whether owned or held by the debtor or by the trustee.

On December 13, 1983 Lawler filed a complaint against the Paulissens alleging that the foreclosure on the Collin County property violated the automatic stay. Lawler sought a declaration that the foreclosure was null and void and he prayed for an order directing the Paulissens to convey the property back to the bankruptcy estate. Alternatively, Lawler sought judgment in the amount of the current fair market value of the property. Finding Lawler's complaint barred by the Texas four-year statute of limitations, the

bankruptcy court granted summary judgment in favor of the Paulissens. Lawler appeals from the district court's affirmance of the order of the bankruptcy court.

Analysis

The sole issue on appeal is whether Lawler's suit against the Paulissens is time barred. Section 11(e) of the Bankruptcy Act of 1898, formerly codified at 11 U.S.C. §29(e), provided in pertinent part:

> A receiver or trustee may, within two years subsequent to the date of adjudication or within such further period of time as the Federal or State law may permit, institute proceedings in behalf of the estate upon any claim against which the period of limitation fixed by Federal or State law had not expired at the time of the filing of the petition in bankruptcy.

Although section 11(e) speaks only to the rights of a receiver or trustee, the provision is applicable to Lawler, who is a debtor in possession under Chapter XI of the 1898 Act. *See Schokbeton Industries, Inc. v. Schokbeton Products Corp.*, 466 F.2d 171 (5th Cir. 1972).

Under the terms of section 11(e) Lawler's claim for violation of the automatic stay was timely if filed within two years of his adjudication in bankruptcy or within such further period of time as permitted by federal or state law. Because Lawler's complaint was filed more than two years after his adjudication in bankruptcy, his suit can proceed only if it was brought within an additional period of time permitted by federal or state law.

There is no federal statute of limitations applicable to a suit alleging a violation of the automatic stay in bankruptcy under the 1898 Act. It is well established, however, that when Congress has not provided a period of limitation federal courts will use the applicable statute of limitations of the forum state. *McMillian v. City of Rockmart*, 653 F.2d 907 (5th Cir. 1981) (citing *O'Sullivan v. Felix*, 233 U.S. 318 (1914)). To determine the applicable state statute

of limitations, "[t]he court must first determine the essential nature of the federal claim before it, and then look to state law in order to determine which state statute is applicable to claims similar to the one before the court." *Id.* at 909.

The nature of Lawler's suit against the Paulissens is that of an action of trespass to try title which, under Texas law, is "any suit that involves a dispute as to the title to land . . . , regardless of its form, and regardless of the character of the right or interest asserted, whether legal or equitable." 61 Tex. Jur.3d *Quieting Title* §37 (1988) (collecting cases). Texas law provides a four-year limitations period for an action of trespass to try title where the deed is voidable, Tex.Rev.Civ.Stat.Ann. art. 5529. In *Slaughter v. Qualls*, 139 Tex. 340, 162 S.W.2d 671, 674 (Tex. 1942), the Texas Supreme Court declared:

> The rule has long been established in this State that where a deed is absolutely void, a suit at law in trespass to try title may be maintained to recover the land without setting the deed aside, and the statutes of limitations governing actions for the recovery of land apply. On the other hand, where a deed is merely voidable and the equity powers of the court must first be invoked to cancel the deed before a suit can be maintained at law to recover the land, the four-year statute, Art. 5529, R.C.S. 1925, controls.
>
> * * *
>
> The question whether the trustee's deed is void or voidable depends on its effect upon the title at the time it was executed and delivered. If it was a mere nullity, passing no title and conferring no right whatsoever, it was absolutely void, but if it passed title to . . . the purchaser, subject only to the right of [the plaintiff] to have it set aside upon proof that the sale was improperly made, then it was merely voidable.

To determine whether the four-year period applies to Lawler's suit against the Paulissens, it is necessary to decide whether actions taken in violation of an automatic stay in bankruptcy are void or voidable under the 1898 Act. We

recently answered this question with respect to the automatic stay provision of the Bankruptcy Code of 1978, 11 U.S.C. §362(a), holding that such violations are voidable. *Sikes v. Global Marine,* ____ F.2d ____, docket number 88-2160. That conclusion was compelled by the bankruptcy court's power to annul a stay under the 1978 Code, 11 U.S.C. §362(d). We noted: "The power to annul authorizes retroactive relief even unto the date of the filing of the petition giving rise to the automatic stay [and] authorizes the court to validate actions taken subsequent to the impressing of the section 362(a) stay." ____ F.2d at ____.

Rules 401 and 601 of the Rules of Bankruptcy Procedure authorized the bankruptcy court to annul an automatic stay under the 1898 Act. In light of the court's authority to grant relief which had a retroactive effect, we are persuaded that actions taken in violation of an automatic stay under the 1898 Act are properly characterized as voidable, not void.[1] Because we find such actions voidable, article 5529 controls under Texas law. Lawler's cause of action against the Paulissens accrued on May 3, 1977, the date of the foreclosure sale. His complaint was filed on December 13, 1983, more than four years later. Therefore, even applying the longer period of time permitted by state law, Lawler's suit was not timely filed.[2]

The judgment of the district court is AFFIRMED.

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[1]We are cognizant that in *Kalb v. Feuerstein,* 308 U.S. 433, 438 (1940), the Supreme Court held that a foreclosure action conducted in violation of an automatic stay in bankruptcy under the 1898 Act was "beyond [the court's] power, void, and subject to collateral attack." *Kalb* was decided in 1940, prior to the adoption of the Rules of Bankruptcy Procedure, which granted the power to annul. We therefore do not find the *Kalb* decision controlling.

[2]We find no merit in Lawler's assertion that the statute of limitations should be tolled due to the bankruptcy court's "foot dragging" with respect to his application to employ special counsel to proceed against the Paulissens and other parties alleged to have violated the automatic stay. The four-year statute of limitations under Texas law had already expired at the time Lawler filed that application on May 22, 1981. Thus, tolling the statute during the period in which the bankruptcy court delayed in acting upon Lawler's application would provide Lawler no surcease.

U.S. COURT OF APPEALS
FILED
OCT 12 1989
GILBERT F. GANUCHEAU
Clerk

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 88-1738

IN THE MATTER OF: H. ROGER LAWLER, ETC., *Debtor,*

H. ROGER LAWLER,
Appellant,

versus

THEODORE A. PAULISSEN,
Appellee.

Appeal from the United States District Court for the Northern District of Texas

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ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

(Opinion August 21, 1989, 5 Cir., 198_, _____. F.2d _____)
(October 12, 1989)

Before REAVLEY, POLITZ and SMITH, Circuit Judges.

PER CURIAM:

(x) The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Federal Rules of Appellate Procedure and Local Rule 35) the Suggestion for Rehearing En Banc is DENIED.

* * *

ENTERED FOR THE COURT:

s/ Henry A. Politz
United States Circuit Judge

APPENDIX C

Rule 401.

PETITION AS AUTOMATIC STAY OF CERTAIN ACTIONS ON UNSECURED DEBTS

(a) Stay of Actions. The filing of a petition shall operate as a stay of the commencement or continuation of any action against the bankrupt, or the enforcement of any judgment against him, if the action or judgment is founded on an unsecured provable debt other than one not dischargeable under clause (1), (5), (6), or (7) of § 17a of the Act.

(b) Duration of Stay. Except as it may be deemed annulled under subdivision (c) or may be terminated, annulled, or modified by the bankruptcy court under subdivision (d) or (e) of this rule, the stay shall continue until the bankruptcy case is dismissed or the bankrupt is denied a discharge or waives or otherwise loses his right thereto.

(c) Annulment of Stay. At the expiration of 30 days after the first date set for the first meeting of creditors, the stay provided by this rule shall be deemed annulled as against any creditor whose debt has not been duly scheduled and who has not filed his claim by that time.

(d) Relief from Stay. Upon the filing of a complaint by a creditor seeking relief from a stay provided by this rule, the bankruptcy court shall set the trial for the earliest possible date, and it shall take precedence over all matters except older matters of the same character. The court may, for cause shown, terminate, annul, modify, or condition such stay.

(e) Availability of Other Relief. Nothing in this rule precludes the issuance of, or relief from, any stay, restraining order or injunction when otherwise authorized.

Rule 601.

PETITION AS AUTOMATIC STAY AGAINST LIEN ENFORCEMENT

(a) Stay Against Lien Enforcement. The filing of a petition shall operate as a stay of any act or the commencement or

continuation of any court proceeding to enforce (1) a lien against property in the custody of the bankruptcy court, or (2) a lien against the property of the bankrupt obtained within 4 months before bankruptcy by attachment, judgment, levy, or other legal or equitable process or proceedings.

(b) Duration of Stay. Except as it may be terminated, annulled, or modified by the bankruptcy court under subdivision (c), (d), or (e) of this rule, the stay shall continue until the bankruptcy case is dismissed or closed, or until the property subject to the lien is, with the approval of the court, set apart as exempt, abandoned, or transferred.

(c) Relief from Stay. On the filing of a complaint seeking relief from a stay provided by this rule, the bankruptcy court shall, subject to the provisions of subdivision (d) of this rule, set the trial for the earliest possible date, and it shall take precedence over all matters except older matters of the same character. The court may, for cause shown, terminate, annul, modify, or condition such stay. A party seeking continuation of a stay against lien enforcement shall show that he is entitled thereto.

(d) Ex Parte Relief from Stay. Upon the filing of a complaint seeking relief from a stay provided by this rule, relief may be granted without written or oral notice to the adverse party if (1) it clearly appears from specific facts shown by affidavit or by a verified complaint that immediate and irreparable injury, loss, or damage will result to the plaintiff before the adverse party or his attorney can be heard in opposition, and (2) the plaintiff's attorney certifies to the court in writing the efforts, if any, which have been made to give the notice and the reasons supporting his claim that notice should not be required. The party obtaining relief under this subdivision shall give written or oral notice thereof as soon as possible to the trustee or receiver or, if none has qualified, to the petitioner or petitioners and, in any event, shall forthwith mail to such person or persons a copy of the order granting relief. On 2 days' notice to the party who obtained relief from a stay provided by this rule

without notice or on such shorter notice to the party as the court may prescribe, the adverse party may appear and move its reinstatement, and in that event the court shall proceed to hear and determine such motion as expeditiously as the ends of justice require.

(e) Availability of Other Relief. Nothing in this rule precludes the issuance of, or relief from, any stay, restraining order, or injunction when otherwise authorized.

Rule 4001.
RELIEF FROM AUTOMATIC STAY; USE OF CASH COLLATERAL; OBTAINING CREDIT; AGREEMENTS

(a) Relief from Stay.

(1) Motion. A motion for relief from an automatic stay provided by the Code shall be made in accordance with Rule 9014.

(2) Final Hearing on Stay. The stay of any act against property of the estate under § 362(a) of the Code expires 30 days after a final hearing commenced pursuant to § 362(e) unless before that time expires the court denies the motion for relief from the stay or, after notice and a hearing, orders the stay continued pending conclusion of the final hearing.

(3) Ex Parte Relief From Stay. Relief from a stay under § 362(a) may be granted without prior notice to the adverse party only if (A) it clearly appears from specific facts shown by affidavit or by a verified motion that immediate and irreparable injury, loss, or damage will result to the movant before the adverse party or the attorney for the adverse party can be heard in opposition, and (B) the movant's attorney certifies to the court in writing the efforts, if any, which have been made to give notice and the reasons why notice should not be required. The party obtaining relief under this subdivision and § 362(f) shall immediately give oral notice thereof to the trustee or debtor in possession and to the debtor and forthwith mail

or otherwise transmit to such adverse party or parties a copy of the order granting relief. On two days notice to the party who obtained relief from the stay without notice or on shorter notice to that party as the court may prescribe, the adverse party may appear and move reinstatement of the stay. In that event, the court shall proceed expeditiously to hear and determine the motion.

(b) Use of Cash Collateral.

(1) Motion; Service. A motion for authorization to use cash collateral shall be made in accordance with Rule 9014 and shall be served on any entity which has an interest in the cash collateral, on any committee appointed under the Code or its authorized agent, or, if no committee has been appointed, on the creditors included on the list filed pursuant to Rule 1007(d) and on such other entities as the court may direct.

(2) Hearing. The court may commence a final hearing on a motion for authorization to use cash collateral no earlier than 15 days after service of the motion. If the motion so requests, the court may conduct a preliminary hearing before such 15 day period expires, but the court may authorize the use of only that amount of cash collateral as is necessary to avoid immediate and irreparable harm to the estate pending a final hearing.

(3) Notice. Notice of hearing pursuant to this subdivision shall be given to the parties on whom service of the motion is required by paragraph (1) of this subdivision and to such other entities as the court may direct.

(c) Obtaining Credit.

(1) Motion; Service. A motion for authority to obtain credit shall be made in accordance with Rule 9014 and shall be served on any committee appointed under the Code or its authorized agent, or, if no committee has been appointed, on the creditors listed on the list filed pursuant to Rule 1007(d), and on such other entities as the court may direct. The motion shall be accompanied by a copy of the agreement.

(2) Hearing. The court may commence a final hearing on a motion for authority to obtain credit no earlier than 15 days after service of the motion. If the motion so requests, the court may conduct a hearing before such 15 day period expires, but the court may authorize the obtaining of credit only to the extent necessary to avoid immediate and irreparable harm to the estate pending a final hearing.

(3) Notice. Notice of hearing pursuant to this subdivision shall be given to the parties on whom service of the motion is required by paragraph (1) of this subdivision and to such other entities as the court may direct.

(d) Agreement Relating to Relief from the Automatic Stay, Providing Adequate Protection, Use of Cash Collateral, and Obtaining Credit.

(1) Motion, Service. A motion for approval of an agreement to provide adequate protection, for the modification or termination of the stay provided for in § 362, for the use of cash collateral, or for approval of an agreement between the debtor and an entity that has a lien or interest in property of the estate pursuant to which the entity consents to the creation of a lien senior or equal to the entity's lien or interest in such property shall be served on any committee appointed under the Code or its authorized agent, or, if no committee has been appointed, on the creditors listed on the list filed pursuant to Rule 1007(d) and on such other entities as the court may direct. The motion shall be accompanied by a copy of the agreement.

(2) Objection. Notice of the motion and the time within which objections may be filed and served on the debtor in possession or trustee shall be mailed to the parties on whom service is required by paragraph (1) of this subdivision and to such other entities as the court may direct. Unless the court fixes a different time, objections may be filed within 15 days of the mailing of notice.

(3) Disposition; Hearing. If no objection is filed, the court may enter an order approving or disapproving the agreement without conducting a hearing. If an objection is filed or if the court determines a hearing is appropriate, the court shall hold a hearing on no less than five days' notice to the objector, the movant, the parties on whom service is required by paragraph (1) of this subdivision and such other entities as the court may direct.

SECTION 362 (11 U.S.C. §362)

§ 362. Automatic stay.

(a) Except as provided in subsection (b) of this section, a petition filed under section 301, 302, or 303 of this title, or an application filed under section 5(a)(3) of the Securities Investor Protection Act of 1970 (15 U.S.C. 78eee(a)(3)), operates as a stay, applicable to all entities, of —

(1) the commencement or continuation, including the issuance or employment of process, of a judicial, administrative, or other action or proceeding against the debtor that was or could have been commenced before the commencement of the case under this title, or to recover a claim against the debtor that arose before the commencement of the case under this title;

(2) the enforcement, against the debtor or against property of the estate, of a judgment obtained before the commencement of the case under this title;

(3) any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate;

(4) any act to create, perfect, or enforce any lien against property of the estate;

(5) any act to create, perfect, or enforce against property of the debtor any lien to the extent that such lien secures a claim that arose before the commencement of the case under this title;

(6) any act to collect, assess, or recover a claim against the debtor that arose before the commencement of the case under this title;

(7) the setoff of any debt owing to the debtor that arose before the commencement of the case under this title against any claim against the debtor; and

(8) the commencement or continuation of a proceeding before the United States Tax Court concerning the debtor.

(b) The filing of a petition under section 301, 302, or 303 of this title, or of an application under section 5(a)(3) of the Securities Investor Protection Act of 1970 (15 U.S.C. 78eee(a)(3)), does not operate as a stay —

(1) under subsection (a) of this section, of the commencement or continuation of a criminal action or proceeding against the debtor;

(2) under subsection (a) of this section, of the collection of alimony, maintenance, or support from property that is not property of the estate;

(3) under subsection (a) of this section, of any act to perfect an interest in property to the extent that the trustee's rights and powers are subject to such perfection under section 546(b) of this title or to the extent that such act is accomplished within the period provided under section 547(e)(2)(A) of this title;

(4) under subsection (a)(1) of this section, of the commencement or continuation of an action or proceeding by a governmental unit to enforce such governmental unit's police or regulatory power;

(5) under subsection (a)(2) of this section, of the enforcement of a judgment, other than a money judgment, obtained in an action or proceeding by a governmental unit to enforce such governmental unit's police or regulatory power;

(6) under subsection (a) of this section, of the setoff by a commodity broker, forward contract merchant, stockbroker, financial institutions, or securities clearing agency of any mutual debt and claim under or in connection with commodity contracts, as defined in section 761(4) of this title, forward contracts, or securities contracts, as defined in section 741(7) of this title, that constitutes the setoff of a claim against the debtor for a margin payment, as defined in section 741(5) or 761(15) of this title, or settlement payment, as defined in section 741(8) of this title, arising out of commodity contracts, forward contracts, or securities contracts against cash, securities, or other property held by or due from such commodity broker, forward contract merchant, stockbroker, financial institutions, or securities clearing agency to margin, guarantee, secure, or settle commodity contracts, forward contracts, or securities contracts;

(7) under subsection (a) of this section, of the setoff by a repo participant, of any mutual debt and claim under or in connection with repurchase agreements that constitutes the setoff of a claim against the debtor for a margin payment, as defined in section 741(5) or 761(15) of this title, or settlement payment, as defined in section 741(8) of this title, arising out of repurchase agreements against cash, securities, or other property held by or due from such repo participant to margin, guarantee, secure or repurchase agreements;

(8) under subsection (a) of this section, of the commencement of any action by the Secretary of Housing and Urban Development to foreclose a mortgage or deed of trust in any case in which the mortgage or deed of trust held by the Secretary is insured or was formerly insured under the National Housing Act and covers property, or combinations of property, consisting of five or more living units;

(9) under subsection (a) of this section, of the issuance to the debtor by a governmental unit of a notice of tax deficiency;

(10) under subsection (a) of this section, of any act by a lessor to the debtor under a lease of nonresidential real property that has terminated by the expiration of the stated term of the lease before the commencement of or during a case under this title to obtain possession of such property; or [*sic*]

(11) under subsection (a) of this section, of the presentment of a negotiable instrument and the giving of notice of and protesting dishonor of such an instrument;

(12)* under subsection (a) of this section, after the date which is 90 days after the filing of such petition, of the commencement or continuation, and conclusion to the entry of final judgment, of an action which involves a debtor subject to reorganization pursuant to chapter 11 of this title and which was brought by the Secretary of Transportation under the Ship Mortgage Act, 1920 (46 App. U.S.C. 911 et seq.) (including distribution of any proceeds of sale) to foreclose a preferred ship or fleet mortgage, or a security interest in or relating to a vessel or vessel under construction, held by the Secretary of Transportation under section 207 or title XI of the Merchant Marine Act, 1936 (46 App. U.S.C. 1117 and 1271 et seq., respectively), or under applicable State law; or

(13)* under subsection (a) of this section, after the date which is 90 days after the filing of such petition, of the commencement or continuation, and conclusion to the

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* [*Ed. Note:* Paragraphs (12) and (13) were added to 11 U.S.C. § 362(b) by § 5001 of the Omnibus Budget Reconciliation Act of 1986, Pub. L. No. 99-509 (1986). Section 5001(b) of Pub. L. No. 99-509 provides:

"the amendments made by subsection (a) of this section shall apply only to petitions filed under section 362 of this title 11, United States Code, which are made after August 1, 1986."

This is inaccurate. "Petitions" are not made under § 362. The proper reference probably should be to "requests" made pursuant to § 362(d). If "petitions" were intended, then the reference should be to "cases commenced."

Section 5001(a) also provides that its provisions apply only to title 11 cases commenced before December 31, 1989.]

entry of final judgment, of an action which involves a debtor subject to reorganization pursuant to chapter 11 of this title and which was brought by the Secretary of Commerce under the Ship Mortgage Act, 1920 (46 App. U.S.C. 911 et seq.) (including distribution of any proceeds of sale) to foreclose a preferred ship or fleet mortgage in a vessel or mortgage, deed of trust, or other security interest in a fishing facility held by the Secretary of Commerce under section 207 or title XI of the Merchant Marine Act, 1936 (46 App. U.S.C. 1117 and 1271 et seq. respectively).

(c) Except as provided in subsections (d), (e), and (f) of this section —

(1) the stay of an act against property of the estate under subsection (a) of this section continues until such property is no longer property of the estate; and

(2) the stay of any other act under subsection (a) of this section continues until the earliest of —

(A) the time the case is closed;

(B) the time the case is dismissed; or

(C) if the case is a case under chapter 7 of this title concerning an individual or a case under chapter 9, 11, 12, or 13 of this title, the time a discharge is granted or denied.

(d) On request of a party in interest and after notice and a hearing, the court shall grant relief from the stay provided under subsection (a) of this section, such as by terminating, annulling, modifying, or conditioning such stay —

(1) for cause, including the lack of adequate protection of an interest in property of such party in interest; or

(2) with respect to a stay of an act against property under subsection (a) of this section, if —

(A) the debtor does not have an equity in such property; and

(B) such property is not necessary to an effective reorganization.

(e) Thirty days after a request under subsection (d) of this section for relief from the stay of any act against property of the estate under subsection (a) of this section, such stay is terminated with respect to the party in interest making such request, unless the court, after notice and a hearing, orders such stay continued in effect pending the conclusion of, or as a result of, a final hearing and determination under subsection (d) of this section. A hearing under this subsection may be a preliminary hearing, or may be consolidated with the final hearing under subsection (d) of this section. The court shall order such stay continued in effect pending the conclusion of the final hearing under subsection (d) of this section if there is a reasonable likelihood that the party opposing relief from such stay will prevail at the conclusion of such final hearing. If the hearing under this subsection is a preliminary hearing, then such final hearing shall be commenced not later than thirty days after the conclusion of such preliminary hearing.

(f) Upon request of a party in interest, the court, with or without a hearing, shall grant such relief from the stay provided under subsection (a) of this section as is necessary to prevent irreparable damage to the interest of an entity in property, if such interest will suffer such damage before there is an opportunity for notice and a hearing under subsection (d) or (e) of this section.

(g) In any hearing under subsection (d) or (e) of this section concerning relief from the stay of any act under subsection (a) of this section —

(1) the party requesting such relief has the burden of proof on the issue of the debtor's equity in property; and

(2) the party opposing such relief has the burden of proof on all other issues.

(h) An individual injured by any willful violation of a stay provided by this section shall recover actual damages, including costs and attorneys' fees, and, in appropriate circumstances, may recover punitive damages.

APPENDIX D

SECTION ELEVEN (11 U.S.C. § 29)

§ 11. Suits By and Against Bankrupts. a. A suit which is founded upon a claim from which a discharge would be a release, and which is pending against a person at the time of the filing of a petition by or against him, shall be stayed until an adjudication or the dismissal of the petition; if such person is adjudged a bankrupt, such action may be further stayed until the question of his discharge is determined by the court after a hearing, or by the bankrupt's filing a waiver of, or having lost, his right to a discharge, or, in the case of a corporation, by its failure to file an application for a discharge within the time prescribed under this Act: *Provided, however,* That such stay shall be vacated by the court if, in a proceeding under this Act commenced within six years prior to the date of the filing of the petition in bankruptcy, such person has been granted a discharge, or has had a composition confirmed, or has had an arrangement by way of composition confirmed, or has had a wage earner's plan by way of composition confirmed.

b. The court may order the receiver or trustee to enter his appearance and defend any pending suit against the bankrupt.

c. A receiver or trustee may, with the approval of the court, be permitted to prosecute as receiver or trustee any suit commenced by the bankrupt prior to the adjudication, with like force and effect as though it had been commenced by him.

d. Suits shall not be brought against a person who has acted as a receiver or trustee of a bankrupt estate, upon any matter arising in connection with the administration thereof, subsequent to two years after the estate has been closed.

e. A receiver or trustee may, within two years subsequent to the date of adjudication or within such further period of time as the Federal or State law may permit, institute proceedings in behalf of the estate upon any claim against which the period of limitation fixed by Federal or State law

had not expired at the time of the filing of the petition in bankruptcy. Where, by any agreement, a period of limitation is fixed for instituting a suit or proceeding upon any claim, or for presenting or filing any claim, proof of claim, proof of loss, demand, notice, or the like, or where in any proceeding, judicial or otherwise, a period of limitation is fixed, either in such proceeding or by applicable Federal or State law, for taking any action, filing any claim or pleading, or doing any act, and where in any such case such period had not expired at the date of the filing of the petition in bankruptcy, the receiver or trustee of the bankrupt may, for the benefit of the estate, take any such action or do any such act, required of or permitted to the bankrupt, within a period of sixty days subsequent to the date of the adjudication or within such further period as may be permitted by the agreement or in the proceeding or by applicable Federal or State law as the case may be.

f. The operation of any statute of limitations of the United States or of any State, affecting the debts of a bankrupt provable under this Act, shall be suspended during the period from the date of the filing of the petition in bankruptcy (1) until the expiration of thirty days after the date of the entry of an order denying his discharge; or (2) if he has waived or lost his right to a discharge, then until the expiration of thirty days after the filing of such waiver or loss of such right or, in the case of a corporation, if no application for a discharge is filed within the period of six months after the adjudication, then until the expiration of thirty days after the end of such period; or (3) until thirty days after the dismissal of the bankruptcy proceedings, whichever may first occur.

APPENDIX E

SECTION 542 (11 U.S.C. § 542)

§ 542. Turnover of property to the estate.

(a) Except as provided in subsection (c) or (d) of this section, an entity, other than a custodian, in possession, custody, or control, during the case, of property that the trustee may use, sell, or lease under section 363 of this title, or that the debtor may exempt under section 522 of this title, shall deliver to the trustee, and account for, such property or the value of such property, unless such property is of inconsequential value or benefit to the estate.

(b) Except as provided in subsection (c) or (d) of this section, an entity that owes a debt that is property of the estate and that is matured, payable on demand, or payable on order, shall pay such debt to, or on the order of, the trustee, except to the extent that such debt may be offset under section 553 of this title against a claim against the debtor.

(c) Except as provided in section 362(a)(7) of this title, an entity that has neither actual notice nor actual knowledge of the commencement of the case concerning the debtor may transfer property of the estate, or pay a debt owing to the debtor, in good faith and other than in the manner specified in subsection (d) of this section, to an entity other than the trustee, with the same effect as to the entity making such transfer or payment as if the case under this title concerning the debtor had not been commenced.

(d) A life insurance company may transfer property of the estate or property of the debtor to such company in good faith, with the same effect with respect to such company as if the case under this title concerning the debtor had not been commenced, if such transfer is to pay a premium or to carry out a nonforfeiture insurance option, and is required to be made automatically, under life insurance contract with such company that was entered into before the date of the filing of the petition and that is property of the estate.

(e) Subject to any applicable privilege, after notice and a hearing, the court may order an attorney, accountant, or other person that holds recorded information, including books, documents, records, and papers, relating to the debtor's property or financial affairs, to to [sic] turn over or disclose such recorded information to the trustee.

SECTION 549 (11 U.S.C. § 549)

§ 549. Postpetition transactions.

(a) Except as provided in subsections (b) or (c) of this section, the trustee may avoid a transfer of property of the estate —

(1) made after the commencement of the case; and

(2)(A) that is authorized only under section 303(f) or 542(c) of this title; or

(B) that is not authorized under this title or by the court.

(b) In an involuntary case, a transfer made after the commencement of such case but before the order for relief to the extent any value, including services, but not including satisfaction or securing of a debt that arose before the commencement of the case, is given after the commencement of the case in exchange for such transfer, notwithstanding any notice or knowledge of the case that the transferee has.

(c) The trustee may not avoid under subsection (a) of this section a transfer of real property to a good faith purchaser without knowledge of the commencement of the case and for present fair equivalent value unless a copy or notice of the petition was filed, where a transfer of such real property may be recorded to perfect such transfer, before such transfer is so perfected that a bona fide purchaser of such property, against whom applicable law permits such transfer to be perfected, could not acquire an interest that is superior to the interest of such good faith purchaser. A good faith purchaser without knowledge of the commencement of the case and for less than present fair equivalent value has a lien on the property transferred to the extent of any present value given, unless a copy or notice of the petition was so filed before such transfer was so perfected.

(d) An action or proceeding under this section may not be commenced after the earlier of —

(1) two years after the date of the transfer sought to be avoided; or

(2) the time the case is closed or dismissed.

APPENDIX F

TEXAS REVISED CIVIL STATUTES ANNOTATED

Article 5529.

Every action other than for the recovery of real estate, for which no limitation is otherwise prescribed, shall be brought within four years next after the right to bring the same shall have accrued and not afterward.

Article 5510.

Any person who has the right of action for the recovery of lands, tenements or hereditaments against another having peaceable and adverse possession thereof, cultivating, using or enjoying the same, shall institute his suit therefor within ten years next after his cause of action shall have accrued, and not afterward. The peaceable and adverse possession contemplated in this article, as against the person having right of action, shall be construed to embrace not more than one hundred sixty acres, including the improvements or the number of acres actually enclosed, should the same exceed one hundred and sixty acres; but when such possession is taken and held under some written memorandum of title, other than a deed, which fixes the boundaries of the possessor's claim and is duly registered, such peaceable possession shall be construed to be co-extensive with the boundaries specified in such instrument.

APPENDIX G

ROBERT A. SIKES AND JANICE K. SIKES,
Plaintiffs-Appellants,

v.

GLOBAL MARINE, INC., et al.,
Defendants-Appellees

No. 88-2160.

United States Court of Appeals,
Fifth Circuit.

Aug. 25, 1989.

Personal injury suit was filed against debtor and other defendants after debtor had filed Chapter 11 petition. Upon learning of bankruptcy petition, plaintiffs sought relief from stay and extension of time for service. The Bankruptcy Court entered orders allowing personal injury action to go forward. The United States District Court for the Southern District of Texas, Filemon B. Vela, J., granted debtor's motion to dismiss, and plaintiffs appealed. The Court of Appeals, Politz, Circuit Judge, held that: (1) acts taken in violation of automatic stay are merely voidable and capable of discretionary cure, rather than voidable and incurable, and (2) bankruptcy court's orders referring to personal injury suit filed against debtor postpetition but without knowledge of bankruptcy filing was not intended to merely allow plaintiffs to refile complaint, but, rather, validated prepetition filing of complaint by granting relief from stay.

Reversed and remanded.

Johnson, Circuit Judge, filed dissenting opinion.

1. Bankruptcy — 2462

Acts taken in violation of automatic stay are merely voidable and capable of discretionary cure, rather than voidable and incurable. Bankr.Code, 11 U.S.C.A. § 362(a, d).

2. Bankruptcy — 2442

Bankruptcy Code section empowering court to grant relief from stay by terminating, annulling, modifying or conditioning stay, by its use of term "annul," authorizes court to validate actions taken subsequent to impressing of automatic stay.

See publication Words and Phrases for other judicial constructions and definitions.

3. Bankruptcy — 2442

Bankruptcy court's orders referring to personal injury suit filed against debtor postpetition but without knowledge of bankruptcy filing was not intended to merely allow plaintiffs to refile complaint, but, rather, validated postpetition filing of complaint by granting plaintiffs relief from stay; order did not differentiate between claims filed and those not yet filed or complaints served and those not yet served, but merely authorized the indentified claims to "go forward." Bankr.Code, 11 U.S.C.A. § 362(a, d).

Bruce W. Bain, Houston, Tex., for plaintiffs-appellants.

M. Susan Hardie, Marion E. McDaniel, Jr., Houston, Tex., for defendants-appellees.

Appeal from the United States District Court for the Southern District of Texas.

Before RUBIN, POLITZ, and JOHNSON, Circuit Judges.

POLITZ, Circuit Judge:

Robert A. Sikes and Janice K. Sikes appeal a judgment granting a Fed.R.Civ.P. 12(b)(6) dismissal of their demands against Global Marine, Inc. and Global Marine Drilling Company (collectively, Global) on the ground that their complaint was filed in violation of an automatic stay in bankruptcy, 11 U.S.C. § 362(a). Concluding that the bankruptcy court validated the filing and authorized the

Sikes to proceed with their complaint, we reverse and remand.

Background

On March 6, 1983 the Sikes filed suit against Global and other defendants for injuries allegedly sustained by Robert A. Sikes on April 12, 1983, while aboard the vessel M/V GLOMAR HIGH ISLAND III. Unbeknownst to the Sikes, on January 27, 1986 Global had filed voluntary petitions in bankruptcy under Chapter 11 of the Bankruptcy Code. As a consequence, their claim was automatically stayed by 11 U.S.C. § 362(a).[1]

The Sikes promptly sought relief from the automatic stay from the bankruptcy court, and an extension of the time for service of the complaint from the district court. Accrual of the three-year limitations was imminent. Global objected in district court to the extension of time for service, contending that the original complaint was null and void. In the bankruptcy court Global asked that the stay not be modified until resolution of a coverage dispute with their insurance carriers. Global further requested that the stay not be lifted pending their transition to debtor-in-possession status.

Approximately nine months later Global resolved the insurance dispute and agreed to a modification of the stay. On February 18, 1987, the bankruptcy court entered an order lifting the stay for 32 causes listed on Exhibit A attached to the order, all identified as matters for which motions to lift stay were pending. The order lifted the stay "for the limited purpose of allowing certain actions to be commenced against Global and allowing discovery to

[1] 11 U.S.C. § 362(a), in part, provides:

(a) Except as provided in subsection (b) of the section, a petition filed under section 301, 302 or 303 of this title . . . operates as a stay, applicable to all entities, of—(1) the commencement or continuation, including the issuance or employment of process, of a judicial, administrative, or other proceeding against the debtor that was or could have been commenced before the commencement of the case under this title, or to recover a claim against the debtor that arose before the commencement of the case under this title . . .

proceed in those actions." The Sikes' claim is listed as number 27 on Exhibit A. In a significant number of the other claims, suit had been filed after the Chapter 11 petitions were filed. Shortly thereafter the original complaint was served on Global.

Global moved to dismiss the Sikes complaint, contending that the original complaint was filed in violation of the automatic stay and was thus null and void. The Sikes filed a new lawsuit and moved for consolidation. Global opposed consolidation on the grounds that the second complaint was barred by the statute of limitations.

On September 25, 1987 the bankruptcy court entered an agreed order, prepared by counsel for Global, modifying the automatic stay. The preamble to the order announced: "CAME ON FOR CONSIDERATION for hearing the various motions to lift the automatic stay to allow personal injury actions to go forward, as identified in Exhibit A attached hereto." The Sikes' claim is listed as number 26 on the exhibit, this time containing 45 claims. The order declared

> that the automatic stay as provided by section 362 of the Bankruptcy Code be further modified with regard to those Motions to Lift Stay identified in Exhibit A for the limited purpose of allowing the personal injury actions identified therein to be commenced against Global, permitting personal injury actions that are pending against Global to proceed, allowing discovery to proceed in those actions, and allowing trials to proceed.

The court prohibited any attempts to enforce or collect on any judgment without further approval of the court.

In urging the motions to dismiss Global maintained that the orders of the bankruptcy court did not validate the earlier filing, that a new filing was necessary. After granting Global's motions to dismiss the district court made the requisite Fed.R.Civ.P. 54(b) determination and the Sikes appealed.

Analysis

[1] A threshold consideration is whether the filing of the Sikes complaint in violation of the automatic stay is void, in the strict sense of that term, or merely voidable. By strict definition that which is void is nugatory and of no effect and cannot be cured; that which is voidable may be either voided or cured. *Black's Law Dictionary,* 1411 (5th ed. 1979); *In re Oliver,* 38 B.R. 245 (Bankr.Minn.1984). We early observed in *Haggart v. Wilczinski,* 143 F. 22, 27 (5th Cir.1906), that when "technical accuracy is desired, the term 'void' can only be properly applied to those [transactions] ... that are of no effect whatsoever, mere nullities, ... and therefore incapable of confirmation or ratification."

The distinction between the terms is much less precise and clear in practical usage. Courts considering whether actions taken in violation of the automatic stay are void or voidable have reached opposite conclusions. Some courts have concluded that actions which violate the automatic stay are void, and therefore incurable. *Miller v. Savings Bank of Baltimore,* 10 B.R. 778 (Bankr.D.Md.1981); *Advent Corp. v. Fidelity & Deposit Company of Maryland,* 24 B.R. 612 (Bankr. 1st Cir.1982); 2 *Collier on Bankruptcy,* 362.11 (15th ed. 1979) (citing cases which hold that actions taken in violation of the stay are void and without effect). Other courts have concluded that the violative actions are merely voidable, and capable of discretionary cure. *In re Fuel Oil Supply and Terminaling, Inc.,* 30 B.R. 360 (Bankr.N.D.Tex.1983); *In re Oliver; In re Brooks,* 79 B.R. 479 (9th Cir.BAP 1987); *In re Sapp,* 91 B.R. 520 (Bankr.E.D.Mo. 1988).

We are persuaded that the better reasoned rule characterizes acts taken in violation of the automatic stay as voidable rather than void. We agree that "the characterization of every violation of section 362 as being absolutely void is inaccurate and overly broad." *Fuel Oil Supply,* 30 B.R. at 362.

[2] In section 362(d) Congress empowered the court to grant relief from the automatic stay "by terminating,

annulling, modifying, or conditioning" the stay. The power to annul authorizes retroactive relief even unto the date of the filing of the petition giving rise to the automatic stay. The power to annul authorizes the court to validate actions taken subsequent to the impressing of the section 362(a) stay. Our colleagues in the Eleventh Circuit reached this conclusion in *In re Albany Partners, Ltd.*, 749 F.2d 670 (11th Cir.1984) declaring that section 362(d)

> expressly grants bankruptcy courts the option, in fashioning appropriate relief, of "annulling" the automatic stay, in addition to merely "terminating" it. The word "annulling" in this provision evidently contemplates the power of bankruptcy courts to grant relief from the stay which has retroactive effect; otherwise its inclusion, next to "terminating," would be superfluous.

749 F.2d at 675. We agree. So does one preeminent secondary authority:

> In addition to the obvious power to "terminate" the stay, [§ 362(d)] also gives the bankruptcy court the power to "annul" the stay. The difference between the two is that an order annulling the stay could operate retroactively to the date of the filing of the petition which gave rise to the stay, and thus validate actions taken by the party at a time when he may have been unaware of the existence of the stay. On the other hand, an order terminating the stay would be operative only from the date of its entry.

2 *Collier's Bankruptcy Manual*, § 362.06 (3d ed. 1983).

We find instructive the fact that the Bankruptcy Code specifically protects certain actions taken in violation of the automatic stay. Under section 549 some transactions made in violation of the stay will be deemed valid unless voided at the trustee's discretion. 11 U.S.C. § 549 ("the trustee may avoid a transfer of property of the estate—(1) that occurs after the commencement of the case . . ."). Section 542(c) ratifies transfers by parties having no knowledge of the bankruptcy case. 11 U.S.C. § 542(c). If everything done post-petition were void in the strict sense of the word, these provisions would either be meaningless or inconsistent with the

specific mandate of section 362(a). We reject both alternatives in concluding that filing a complaint in an unknowing violation of the automatic stay is voidable, not void.[2]

[3] Having concluded that the initial filing of the Sikes complaint was merely voidable, we must determine whether the bankruptcy court intended to validate the filing of the original complaint. We conclude that it did. In entering its orders on February 18, 1987 and again on September 25, 1987, the bankruptcy court referred to those cases in which motions to lift stay had been filed. Those cases were identified by name of the claimants and the names and addresses of claimants' counsel. The court specifically allowed actions to commence and allowed pending actions to proceed. We are bound to assume, absent clear demonstration to the contrary, that the bankruptcy court was aware of the filing date of the respective complaints. Aware of the filing date of the Sikes complaint, the bankruptcy court permitted it to proceed.

We recognize that the order was an *en globo* order, one which did not differentiate between claims filed and those not yet filed, or complaints served and those not yet served. The order authorized the identified claims to "go forward," "commence," "proceed." As we perceive the orders, they contemplated an appropriate application to each case, eliminating the necessity for 32 separate orders in February, increased to 45 orders by September.

When the Sikes filed their complaint they were unaware of the bankruptcy petitions. Upon learning of the automatic

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[2]Our decision today does not conflict with the Supreme Court's holding in *Kalb v. Feuerstein*, 308 U.S. 433, 60 S.Ct. 343, 346, 84 L.Ed. 370 (1940), involving a post-petition real property foreclosure action, where the Court stated: "[T]he action of the Walworth County Court was not merely erroneous but was beyond its power, void, and subject to collateral attack." When the Supreme Court decided *Kalb* in 1940, bankruptcy referees had the express statutory power only to modify or terminate the automatic stay. The power to annul the stay had not been authorized. Accordingly, where the violation of the stay was statutorily proscribed and an applicable exception did not exist, the violative action was void. That scenario no longer applies.

stay they moved the court for relief from the stay. The bankruptcy court granted that relief. We find the court's intent clear — it was permitting these claims to proceed to judgment. We decline to accept Global's argument that the order merely allowed the Sikes permission to refile their complaint. We perceive no valid purpose to be served by requiring that the Sikes file more papers with an already burdened court. Nor are we prepared to burden the Sikes with adverse effects flowing from any imprecision in the language of the order which Global prepared.

We hold that the filing of the Sikes' complaint was a voidable action and that the bankruptcy court had the option to validate it. We further hold that the bankruptcy court validated the filing when it granted the Sikes relief from stay in its order of February 19, 1984, as restated and reinforced in its order of September 25, 1987.

We REVERSE and REMAND for further proceedings consistent herewith.

JOHNSON, Circuit Judge, dissenting:

In entering its agreed orders modifying the automatic stay in the instant case, the bankruptcy court, in its first order, allowed the commencement of certain personal injury actions against the debtor Global and, in its subsequent order, allowed those actions to proceed forward. The majority today concludes that, on the basis of the above orders, the bankruptcy court validated the otherwise void filing of the personal injury complaint of the Sikes in violation of the automatic stay. Persuaded that the above conclusion interprets too broadly the relevant orders of the bankruptcy court and contravenes the fundamental purpose underlying the automatic stay in bankruptcy, I respectfully dissent.

In general, "[a]cts in violation of the [automatic] stay are void *ab initio* regardless of lack of knowledge of the filing of the petition." *Matter of J & L Transport, Inc.*, 47 B.R. 51, 52-53 (Bkrtcy.W.D.Wis.1985). The majority, however, states that such acts are in some instances voidable, instead of void, by virtue of the express powers granted to the

bankruptcy court in Section 362(d) of the Bankruptcy Code to grant relief from the automatic stay "by terminating, annulling, modifying, or conditioning" the stay. While in agreement with the proposition that a bankruptcy court may validate an otherwise void filing in violation of the automatic stay, I am not persuaded that such was the intent of the bankruptcy court in the instant case for the following reasons.

After several parties petitioned the bankruptcy court for relief from the automatic stay triggered by the filing by Global for bankruptcy relief, the bankruptcy court, pursuant to an agreed order entered on February 18, 1987, modified the automatic stay "for the *limited* purpose of allowing [certain] personal injury actions ... to be commenced against Global and allowing discovery to proceed in those actions." Among those personal injury actions allowed to be commenced by the February 18 order, as identified in the attachment to that order, as identified in the attachment to that order, was the personal injury action of the Sikes against Global. In so identifying the action of the Sikes in the February 18 order, however, the bankruptcy court did not refer to the cause number of the previous complaint filed by the Sikes in violation of the automatic stay. Thereafter, the bankruptcy court entered another agreed order on September 25, 1987, further modifying the automatic stay for the limited purpose of allowing "personal injury actions that are pending against Global to proceed, allowing discovery to proceed in those actions, and allowing trials to proceed." Contrary to the conclusion reached by the majority today, I am persuaded that the express language of the February 18 order of the bankruptcy court only allowed the *commencement* of personal injury actions against Global. Thereafter, the September 25 order allowed the continuation of previous personal injury action already *validly* filed against Global by virtue of the earlier modification of the automatic stay by the February 18 order. In this regard, the agreed orders of the bankruptcy court did not relate back to the initial filing by the Sikes of their complaint in violation of the automatic stay and validate that filing. To infer such

a radical form of relief from the limited actions of the bankruptcy court contravenes a fundamental purpose of the automatic stay in bankruptcy — that purpose being to provide the debtor with relief from his creditors and their collection efforts.

This is not to say that a bankruptcy court may never validate otherwise void filings should it choose to do so; the majority opinion ably sets forth the powers of the bankruptcy court in this regard. Nevertheless, this Court should not imply such relief from the automatic stay in the absence of an express intent by the bankruptcy court to afford that relief. If the bankruptcy court in the instant case had intended to validate otherwise void filings in violation of the automatic stay, it could have expressly provided for such relief through the inclusion of specific language to such effect in its orders. It did not do so. Accordingly, I respectfully dissent.